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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-213

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND ITS MEMBER LINES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is not reported. The order (Pet. App. 74-76) and opinion of the Federal Maritime Commission served December 31, 1970 (Pet. App. 36-73) are reported at 14 F.M.C. 172. The Commission's prior decisions of March 27, 1964 and of January 23, 1969 are reported at 8 F.M.C. 16, 49-51 and 12 F.M.C. 149, respectively. The opinion of the Court of Appeals for the Ninth Circuit on review of the Commission's decision of March 27, 1964, is report-

ed at 350 F.2d 197, certiorari denied, 382 U.S. 958, and its *per curiam* opinion on petition for rehearing is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1972. The petition for a writ of certiorari was filed on August 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTION PRESENTED

Federal Maritime Commission v. *Svenska Amerika Linien*, 390 U.S. 238, sustained the Federal Maritime Commission's reliance upon antitrust policy as a basis for disapproving restrictive rules of steamship conferences as "contrary to the public interest" under Section 15 of the Shipping Act, 1916. The question is whether the Commission properly applied that decision in requiring the modification of petitioners' dual-rate contract under the identically worded provision of Section 14b of that Act.

STATUTES INVOLVED

Sections 14b and 15 of the Shipping Act, 1916, 39 Stat. 733, 75 Stat. 762, as amended, 46 U.S.C. 813a, 814, are set forth at Pet. App. 30-35.

STATEMENT [1]

Petitioner shipping conference is the successor to ten independent conferences.[2] Each of the ten had set rates for its member lines for a segment of the area between the Pacific Coast of the United States and Canada, on the one hand, and various ports throughout Latin America, on the other (J.A. 2, 62).[3] This proceeding was instituted by the filing for approval with the Federal Maritime Commission, pursuant to Section 15 of the Shipping Act, of Agreement No. 8660. Under the Agreement, the ten previously separate conferences were consolidated into one; the trade was divided into five areas, three outbound from the United States and Canada and two inbound; and only those carriers actively serving a particular area could participate in the setting of rates for that area (Pet. App. 2-3, 37).

While Agreement No. 8660 was under consideration by the Commission, the petitioners filed for Com-

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[1] This statement sets forth the facts relevant to the issue presented by the petition. The complex procedural history of the case, which is omitted here, is set out in the opinion below (Pet. App. 2-6).

[2] A shipping conference is an association of common carriers by water whose principal function typically is to define the trade area the members are to serve and to fix the rates to be charged by the members in that area. See *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238, 241.

[3] "J.A." refers to the Joint Appendix used in the court of appeals and lodged by petitioners with this Court (Pet. 2). "Pet. App." refers to the Appendix to the Petition.

mission approval under Section 14b of the Shipping Act dual rate contracts which they proposed to offer to shippers. Under such a contract, shippers who agree to deal exclusively with conference members, and not with independent carriers in the trade served by the conference, are charged lower rates than are charged shippers who do not so agree (Pet. App. 3, n. 2). See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481. Under the contracts proposed by petitioners, shippers could not obtain the benefit of lower rates by agreeing to deal exclusively with petitioners in a single trade area only; rather, shippers had to agree to the exclusive use of petitioners' vessels in all three outbound areas, and their receivers to the exclusive use of petitioners' vessels in both inbound trade areas (Pet. App. 3, 37-38).

After full evidentiary hearings, the Commission approved Agreement No. 8660 permitting the ten previously separate conferences to be merged into one. The Commission also authorized the newly consolidated conference to use the dual-rate contracts. However, it imposed a condition on their use: that the conference offer the contracts to merchants on a separate basis in each of the five trade areas, because otherwise "merchants will be forced to obligate themselves to exclusive conference patronage in trade areas not desired in order to obtain contract [i.e., lower] rates in a trade area where they feel the dual rate contract meets their needs." 8 F.M.C. 16, 50 (Pet. App. 39). It said (Pet. App. 56):

> * * * Whereas before the approval of Agreement 8660 a shipper could have signed a dual rate contract with one, several, or all of ten conferences * * *, now a shipper must obligate himself in all three outbound trades and a receiver in both inbound trades. * * *

The Commission cited its previously declared policy, which the Court had approved in *Svenska*, that "anticompetitive activity [which] involves the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Shipping Act * * * is * * * contrary to the public interest," and that anticompetitive agreements would be sustained only if they are shown to be required to meet "a serious transportation need, necessary to serve important public benefits or in furtherance of some valid regulatory purpose of the Shipping Act."[4] (Pet. App. 40-41, citing *Investigation of Passenger Travel Agents*, 10 F.M.C. 27, 34-35, which was ultimately affirmed in

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[4] On February 16, 1966, at an earlier stage of these proceedings, the Commission had aproved the dual-rate contracts proposed by the petitioners. There was a dispute, however, as to the scope of the Commission's approval, *i.e.*, whether the approval was intended to be subject to the condition that petitioners offer the contracts on a separate basis in each of the five trade areas. The Commission found it unnecessary to resolve the dispute and assumed for purposes of the proceeding that it had approved the contracts as proposed by petitioners. See 12 F.M.C. 149, 151, n. 3. Under Section 14(b) of the Act, the Commission is directed to "withdraw permission * * * if it finds * * * that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest" (Pet. App. 31).

Federal Maritime Commission v. *Svenska*, 390 U.S. at 243.)

The Commission concluded that the requirement here, which petitioners sought to impose on shippers, was more restrictive than necessary to serve any valid Shipping Act purpose. It held that petitioners' "all or nothing approach" (Pet. App. 56) unnecessarily limited the shippers' options without any compensating public benefits; and that the evidence on which petitioners relied to show public benefits, such as rate stability, increased service, etc., showed that these advantages were due to concerted rate-making by the consolidated conference rather than to petitioners' dual rate contracts (Pet. App. 43-55).

The court of appeals, after a comprehensive analysis of the law and the Commission's evaluation of the evidence, upheld the Commission's decision (Pet. App. 1-29). The court noted (*id.* at 29) that "the Commission did not disapprove of the dual rate contract concept, but merely placed limitations upon its use. Such action is clearly in accord with our national policy that only the least restrictive inroads into free competition will be tolerated. Absent the protection of section 14b, the exclusive patronage tying system embodied in a dual rate contract would clearly run counter to the antitrust laws. Having failed to present sufficient evidence which detracts from the weight of this antitrust factor, we find the Commission's conclusion that petitioners' proposed dual rate contracts are contrary to the public interest to be based upon substantial evidence and, accord-

ingly, affirm the Commission's order [citations omitted]."

ARGUMENT

In *Federal Trade Commission* v. *Svenska Amerika Linien*, 390 U.S. 238, the Court held that under Section 15 of the Shipping Act, which authorizes the Commission to approve, and thereby to exempt from the anti-trust laws certain anti-competitive agreements, the Commission could not "ignore the antitrust laws" in determining (as required by the Act) whether the proposed agreements were " 'contrary to the public interest' " (390 U.S. at 245, n. 4). The Court also held that "the antitrust test formulated by the Commission [and applied in this case] is an appropriate refinement of the '* * * public interest' standard" (390 U.S. at 246).

Although Section 14(b), which authorizes the Commission to approve the dual-rate contract at issue, contains the identical "public interest" standard as Section 15, petitioners argue that the Commission must ignore antitrust considerations in determining whether the contract is contrary to the public interest. Their arguments, which are thoroughly considered and rejected in the opinion of the court of appeals, upon which we principally rely, are simply an attempt to relitigate *Svenska*.

1. *Svenska* and other cases have repeatedly recognized the well-settled principle that "the public interest" standard in a regulatory statute authorizes, indeed requires, the administering agency to

consider the antitrust implications of the restraints it is being asked to sanction. *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261; *Denver & Rio Grande Western R.R. Co.* v. *United States*, 387 U.S. 485, 492-494; *California* v. *Federal Power Commission*, 369 U.S. 482, 484-485; *United States* v. *Radio Corporation of America*, 358 U.S. 334, 351; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80.

Contrary to petitioners' assertion, the decision below did not misapply *Svenska*. They contend that the *Svenska* principle which was promulgated under Section 15 and relates to restrictive agreements generally, should not have been applied to exclusive patronage dual-rate contracts which are governed by Section 14b. They rely on the allegedly "clear language" of the section and its legislative history (Pet. 12-17). As the court below correctly pointed out, however, "the 1961 amendments articulated a 'public interest' standard couched in substantially similar language in both sections 15 and 14b" (Pet. App. 19-20). Moreover, it noted, "the language of section 15 is no less mandatory" than that of Section 14b (*id.* at 20).

Petitioners draw too much from the legislative history. They point to nothing in that history which indicates that the contracts Congress considered were of the highly restrictive type here involved *i.e.*, a contract which requires the shipper, in order to get lower rates, to agree to use conference vessels exclusively in more than one trade area. Rather, since

conferences were comprised of steamship lines serving a single trade area, the dual-rate contract contemplated by the bill enacted into Section 14b was the typical contract limited in its coverage to a single trade area.[5] See H. Rep. No. 498, 87th Cong., 1st Sess.; S. Rep. No. 860, 87th Cong., 1st Sess.

Moreover, the references petitioners cite do not support their claim that Congress intended to foreclose the Commission from considering the antitrust implications of particular dual-rate arrangements. Rather they indicate the contrary. The quoted passage from the House Report No. 498 (Pet. 13-14) states that "our traditional antitrust concepts cannot be *fully* applied * * *" and that "any attempt to effect regulation of this commerce in a measure *comparable* to that applied to our domestic commerce would be" detrimental. On the same page is the statement, which petitioners do not quote, that the bill "represents a *minimum* but necessary deviation from the concepts of the antitrust law" (emphasis added). H. Rep. No. 498, *supra*, at p. 13.[6] See, also *Svenska*,

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[5] Of the ten separate conferences which were to be consolidated into one by Agreement No. 8660, *supra*, eight had dual rate contracts, each contract being limited to the respective trade area served by that conference, and two had none (J.A. 3).

[6] Petitioners overemphasize the significance of the deletion from the House bill of a requirement that the Commission make an affirmative finding that dual-rate contracts would be in the public interest (Pet. 14-17). Section 15 similarly requires no affirmative finding by the Commission and, as the court below noted (Pet. App. 21), this Court in *Svenska* rejected a similar argument with respect to that section. Also,

390 U.S. at 245, n. 4, construing similar statements of legislative intent as being "entirely consistent" with the Commission's policy.

2. Petitioners assert that although the Commission had the "burden of proof," it introduced "no evidence" to show that petitioners' contract was "contrary to the public interest * * *" (Pet. 17, 18-19).

Petitioners' contention is in essence an attempt to reargue *Svenska*. In that case the Commission had also withdrawn approval for the use of certain restraints which had been in effect for more than 25 years (12 F.M.C. 149, 156, n. 11). The conferences there argued (390 U.S. at 244-245):

> * * * that the antitrust test is not a permissible elaboration of the statutory standards * * * [and that] incompatibility with the antitrust laws [cannot] be a sufficient reason for denying immunity from these laws * * * accordingly the Commission cannot require further justifications from the shipping lines but must itself demonstrate the way in which the statutory requirements are violated.

In rejecting these arguments as "not even superficially persuasive" (*id.* at 245), the Court stated (*id.* at 245-246):

> * * * antitrust concepts are intimately involved in the standards Congress chose. * * * The Com-

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as the opinion below pointed out, "the excision of the affirmative showing requirement may have been thought useful, as the Senate Report observes, in that it allows easy cases to be disposed of quickly without building an extensive record" (*id.* at 21; footnote omitted).

> mission must of course adduce substantial evidence to support a finding under one of the * * * standards * * *, but once an antitrust violation is established this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor. * * * [7]

In the instant case, it was not disputed that petitioners' contracts would violate the antitrust laws. The real question was whether petitioners' evidence in attempted justification " 'fairly detract[ed] from the weight' " of this factor. Petitioners' assertion that their evidence was a sufficient justification (Pet. 19) raises only the question whether the Commission properly evaluated that evidence. The Commission's finding to the contrary was thoroughly and carefully reviewed by the court of appeals, which found it to be adequately supported by the record (Pet. App. 25-29). The court of appeals pointed out that (Pet. App. 27-28):

> * * * petitioners were unable to demonstrate either that these advantages [i.e., those claimed by petitioners in justification] were due to the two-contract system or that these advantages would cease upon enactment of a five-contract system. As the Commission indicated after a thorough review of the evidence, the witnesses [were]

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[7] The statement quoted above answers petitioners' contention that the Commission's action violated the provision of the Administrative Procedure Act (5 U.S.C. 556(d)) which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

> often confused and were unable to distinguish advantages derived from conference amalgamation and the dual rate contract system. [Footnotes omitted.]

Further review of this essentially factual question is not warranted. Cf. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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